1988

Transwest Management Corporation v. Department of Employment Security : Brief of Appellant

Utah Court of Appeals

David L. Wilkinson; Attorney General of Utah; K. Allen Zabel; Special Assistant Attorney General; Attorneys for Defendant and Respondent.

Lon Rodney Kump; Richards, Bird and Kump; Attorney for Plaintiff and Appellant.

DOCKET NO. 880328-CA

IN THE UTAH COURT OF APPEALS

TRANSWEST MANAGEMENT CORPORATION, Plaintiff and Appellant,	)	Case No. 880328-CA
vs.	)	
DEPARTMENT OF EMPLOYMENT SECURITY, Defendant and Respondent.	)	Priority Classification No. 6

BRIEF OF APPELLANT

PETITION FOR REVIEW FROM DECISION OF
THE BOARD OF REVIEW OF
THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

David L. Wilkinson
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah 84114

by

K. Allen Zabel
Special Assistant Attorney General
The Industrial Commission of Utah
Department of Employment Security
1234 South Main Street
Salt Lake City, Utah 84147

Attorneys for Defendant
and Respondent

Lon Rodney Kump
RICHARDS, BIRD & KUMP, a P.C.
333 East Fourth South
Salt Lake City, Utah 84111-2988

Attorney for Plaintiff and
Appellant

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1234 South Main Street
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and Respondent

Lon Rodney Kump
RICHARDS, BIRD & KUMP, a P.C.
333 East Fourth South
Salt Lake City, Utah 84111-2988

Attorney for Plaintiff and
Appellant

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BRIEF OF APPELLANT

STATEMENT SHOWING JURISDICTION OF COURT OF APPEALS

This appeal is from a final judgment of the Industrial Commission of Utah and the Court of Appeals has appellate jurisdiction under § 78-2A-3(2)(a) of Utah Code Annotated.

STATEMENT SHOWING NATURE OF THE PROCEEDINGS

Transwest Management Corporation (herein "Transwest" and/or "appellant") filed a Petition for Writ of Review to correct factual and legal errors in a Decision of the Board of Review which had adopted the Decision of an Administrative Law Judge before the Industrial Commission of Utah, Department of Employment Security (herein "Department" and/or "respondent").

STATEMENT OF THE ISSUES

Did the Department correctly hold that Transwest was a successor to PBI Freight for experience rating purposes and change appellant's rate from .005 to .014?

DETERMINATIVE STATUTE

See Addendum.

STATEMENT OF THE CASE

By a Decision dated May 15, 1988, the Board of Review upheld a Decision of the Administrative Law Judge which had upheld a Decision of the Department changing Transwest's experience rating from .005 to .014. Both factual and legal errors were made by these Decisions. Transwest's rating should remain at .005.

STATEMENT OF THE FACTS

An understanding of the distinct legal entities involved in this proceeding is essential to an analysis of the issues involved. The entities are:

1. PBI Freight Service, a Utah corporation that owns tractors and trailers and conducts trucking services. It formerly performed a pick-up and delivery service, both interstate and intrastate Utah.

When the Utah Legislature deregulated trucking by the Motor Carrier Act of 1986, PBI Freight Service discontinued its Utah intrastate operations. It no longer conducts a pick-up and delivery service. It has since sold to non-related third parties approximately fifty percent (50%) of its equipment. (R. 28) PBI Freight Service has continued to conduct trucking operations in interstate commerce and still has employees in

California, Texas, and Arizona. (R. 30)

2. D and H Investment Company, a Utah corporation which owns the stock of D and H Real Estate Company, a Utah corporation. On October 1, 1986 this company leased 15 tractors to perform a new transportation service: U-Load, We Haul, U-Save $$$. (R. 47-49)

3. D and H Real Estate Company, a Utah corporation which owns a building in Orem, Utah, containing an office and shops. (R. 28) This company also owns tractors and trailers and conducts an interstate truckload trucking business under the dba of D and H Trucking. (R. 28, 30) This company did not have any Public Service Commission of Utah authority and, therefore, was not affected by the deregulation of trucking intrastate Utah by the Motor Carrier Act of 1986. This company never performed a pick-up and delivery service as performed by PBI Freight Service.

4. Transwest Shippers Association, a Utah non-profit corporation. Members of this Utah non-profit corporation obtain transportation services from D and H Trucking under its contract carrier permit as issued by the Interstate Commerce Commission for truckload service (as distinguished from pick-up and delivery service (R. 36) which was formerly performed by PBI Freight Service within the State of Utah under its Public Service Commission of Utah authority).

5. Transwest Management Corporation, a Utah corporation

with a management contract to handle the operations of Transwest Shippers Association and which company now does all payroll records for all of the above-listed legal entities. (R. 26) The business of PBI was not transferred to Transwest Management. (R. 17)

The Department's Decision dated August 5, 1987 held Transwest Management Corporation to be a successor to PBI Freight Service for experience rating purposes under § 35-4-7(c)(1)(C) of the Utah Employment Security Act. (R. 7) This changed Transwest's experience rating from .005 to .014.

SUMMARY OF THE ARGUMENT

1. The Review Board erred in finding factually that PBI Freight had discontinued operations.

2. The Review Board erred in holding that Transwest Management Corporation was a successor to PBI Freight.

3. The Decision of the Board of Review is contrary to the Decision of the Supreme Court of the State of Utah in the case of Theurer v. Board of Review, 725 P.2d 1338 (Utah 1986).

4. The Review Board erred in failing to consider the payroll experience and benefit costs of both employers as required by the Utah Employment Security Act.

5. The Review Board failed to properly interpret and apply the Utah Employment Security Act.

DETAIL OF THE ARGUMENT

POINT I

THE REVIEW BOARD ERRED IN FINDING FACTUALLY THAT PBI FREIGHT HAD DISCONTINUED OPERATIONS

The Administrative Law Judge ignored the facts in this proceeding and made his Decision based upon conclusions which were not supported by facts of record. The Board of Review merely whitewashed the Administrative Law Judge's Decision and

> ". . . adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge." Decision of Board of Review (R. 52)

The Administrative Law Judge states in his Decision:

> "When PBI closed, the same assets which the employees used while being reported under PBI's account were then used by the same employees who are now being reported under Transwest's account." (R. 44)

The only basis in the Record for this Finding of Fact or Conclusion was a notation made on Exhibit 5 by an employee of the Department reading as follows:

> "As of 1/1/87, PBI Freight closed their local trucking division." Ex. 5 (R. 2)

and a statement on Exhibit 4 made by the Controller of Transwest stating that:

> "We closed our PBI <u>division</u> and we have now concentrated on our <u>truckload operations</u> and have moved all employees to Transwest Management." Ex. 4 (R. 4)

At the hearing, Transwest's Controller and President clarified that this was just a division of PBI that had closed. (R. 30) This division was their local PSC Utah operations, which had been closed down because of deregulation of trucking in Utah. The witnesses testified that PBI Freight Service had not discontinued operations (R. 26, 30) and that Transwest had not acquired all of the assets of PBI Freight Service (R. 30). The testimony of Controller Wood was as follows:

> "We still have employees in California, Texas and Arizona." (R. 30)

PBI's 1987 IRS Form 9406 shows wages for the year of $52,263.35. (R. 50)

The testimony of President Roberts and Controller Wood at the hearing clarified that it was merely the Public Service Commission of Utah pick-up and delivery operation which had been discontinued (R. 36) and that PBI Freight Service continued to have operations and employees in other states. (R. 27)

The D and H Trucking operation, which is a dba of D and H Real Estate Company, is a truckload operation (R. 36) operating under an ICC permit. (R. 30) It performs a new service described as "U-Load, We Haul." (R. 27) This is a far different operation than the pick-up and delivery service formerly rendered by PBI Freight Service.

There is no evidence of record that PBI Freight Service discontinued operations. The Department erroneously concluded

that the closing of a division was the same as discontinuing operations.

POINT II

THE REVIEW BOARD ERRED IN HOLDING THAT TRANSWEST MANAGEMENT CORPORATION WAS A SUCCESSOR TO PBI FREIGHT

The Department determined Transwest to be a successor to PBI. The Administrative Law Judge ruled that the Department correctly determined Transwest to be a successor to PBI. (R. 44) The Board of Review summarily adopted the Findings of Fact of the Administrative Law Judge. (R. 52)

There is no evidence of record that Transwest is a successor to PBI. The facts show exactly the opposite. PBI is still in business conducting the interstate operations which it previously conducted. PBI merely discontinued its Utah intrastate pick-up and delivery operations. Mr. Roberts testified:

> "The business of PBI was never transferred to Transwest Management, . . ." (R. 17)

D and H Trucking, a dba of D and H Real Estate Co., is conducting truckload operations under its Interstate Commerce Commission permit authorizing it to perform service for Transwest Shippers Association. Neither Transwest nor D and H Trucking acquired all of the assets of PBI Freight Service. Only three old tractors could have been considered transferred, consisting of only two percent of net worth of tractors leased for the new operations of D and H Trucking. (R. 46) Neither Transwest nor

D and H Trucking acquired any of the business of PBI Freight Service. Neither acquired any of the accounts receivable of PBI Freight Service.

It was a factual error for the Department to determine that Transwest is a successor to PBI. The Department ignored the fact that Transwest is a truckload operation as distinguished from the pick-up and delivery service of PBI Freight Service.

POINT III

THE DECISION OF THE BOARD OF REVIEW IS CONTRARY TO THE DECISION OF THE SUPREME COURT OF THE STATE OF UTAH IN THE CASE OF THEURER V. BOARD OF REVIEW, 725 P.2d 1338 (UTAH 1986)

In a recent Decision the Supreme Court of Utah reversed and remanded a Decision of the Board of Review, Industrial Commission of Utah, Department of Employment Security. Scott L. Theurer, D.M.D., Employer, v. Board of Review, Industrial Commission of Utah, Department of Employment Security, 725 P.2d 1338 (Utah 1986), Supreme Court No. 20903 decided September 12, 1986. In this proceeding the Industrial Commission had held that Dr. Theurer (a dentist) had acquired all or substantially all of the assets of Dr. Steven Larson (a dentist) and, therefore, that the wage and benefit cost experience of both dentists must be considered jointly for purposes of determining Dr. Theurer's unemployment compensation payments under Utah Code Annotated § 35-4-7(c)(1)(C).

The facts in Dr. Theurer's case were far stronger in showing either a successor or a discontinuance of operations

than in the instant proceeding. For instance, Dr. Theurer had begun a dentistry practice in Logan in July of 1984 by acquiring the dental equipment for his business for $52,750 from Dr. Larson, who discontinued his practice in Logan and moved out of state. Dr. Larson had retained various hand tools and other items worth approximately $4,000 and his accounts receivable worth approximately $41,206. Dr. Theurer leased the building which Dr. Larson had occupied for his practice. Dr. Larson remains the owner of the building. Dr. Theurer also leased equipment from Dr. Larson which was valued at $10,000. Dr. Theurer paid Dr. Larson a total of $55,000. The purchase price included not only the dental equipment but also a letter of introduction which informed Dr. Larson's patients that he was leaving the area and that he recommended Dr. Theurer. The purchase agreement also contained a restrictive covenant that Dr. Larson would not practice general dentistry within 25 miles for a period of five years. Dr. Larson had 1,300 active patients and Dr. Theurer estimated that 100 of the patients had left in preference for a different dentist, 700 to 900 continued to use Dr. Theurer and 200 were of an unknown status. Based on these facts the Department ruled that Dr. Theurer acquired substantially all the assets of Dr. Larson's dental practice.

In spite of the fact that Dr. Theurer practiced dentistry in the same building with most of the same equipment and for most of the same patients, the Supreme Court reversed the Department

and held that there was not successor liability under § 35-4-7(c)-(1)(C) as a matter of law.

The Supreme Court in the Theurer decision noted that the Legislature had significantly amended § 35-4-7(c)(1)(C) several times and was aware of the case law interpreting similar statutes in other jurisdictions. The Court noted that the Legislature chose to retain the "substantially all of the assets" test in this section. The Supreme Court concluded that 75 percent of the assets is not substantially all of the assets. The Court relied upon a New Hampshire decision that "substantially all" is not less than 90 percent. The Court deemed it critical that the Legislature had not changed the language to "substantially all of the business" but continued to maintain in the legislative enactment the words "substantially all of the assets."

From this recent decision of the Supreme Court of Utah interpreting the statute in question, it is clear that the Department is in error in this proceeding. There is no evidence in this proceeding that Transwest or D and H Trucking acquired 90% of the assets of PBI Freight Service.

POINT IV

THE REVIEW BOARD ERRED IN FAILING TO CONSIDER THE PAYROLL EXPERIENCE AND BENEFIT COSTS OF BOTH EMPLOYERS AS REQUIRED BY THE UTAH EMPLOYMENT SECURITY ACT

If the facts showed that PBI Freight Service had "discontinued operations" and Transwest had "acquired all or substantially

all of the assets," then the Department should have considered:

> "The benefit costs of both employers, and the payrolls of both employers during the qualifying period shall be jointly considered . . ." Section 35-4-7(c)(1)(C)

in establishing the experience rating. The Department did not follow this portion of the applicable statute. The Department merely assigned the former rate of PBI Freight Service to Transwest.

The Department's witness explained his calculations. (R. 25) Using his figures, the rate should have been .0133 rather than the assigned rate of .014. (Ex. 6) (R. 1)

Instead of "jointly considering" the employers as required by the statute, the Department:

> "transferred 100% of the taxable payroll and benefit costs . . ." Ex. 1 (R. 7)

The Department should have jointly considered the payroll experience and benefit costs. The Department did not do this and, therefore, failed to follow the legislative enactment.

POINT V

THE REVIEW BOARD FAILED TO PROPERLY INTERPRET AND APPLY THE UTAH EMPLOYMENT SECURITY ACT

The applicable statute states:

> ". . . and the other employer had discontinued operations upon the acquisition . . ." UCA 35-4-7(c)(1)(C)

and

> " . . . has acquired all or substan-

tially all the assets of another employer . . ." UCA 35-4-7(c)(1)(C)

Both contingencies are required. The facts in this proceeding show that neither happened.

Instead of listening to the facts as presented by the witnesses at the hearing, the Department improperly concluded that PBI Freight had discontinued operations and that Transwest was a successor to PBI Freight. The Department failed to follow the statute in assigning a new rate to Transwest. The Department should have maintained Transwest's rate at .005.

CONCLUSION

The facts in this proceeding do not support the Decision of the Department. The Department failed to follow the legislative enactment in changing Transwest's experience rating rate from .005 to .014.

DATED this 10th day of August, 1988.

Respectfully submitted,

RICHARDS, BIRD & KUMP, a P.C.

By: Lon Rodney Kump
Lon Rodney Kump

Attorneys for Plaintiff-Appellant
Transwest Management Corporation

ADDENDUM

1. 35-4-7(c)(1)(C), Utah Code Annotated

35-4-7(c)(1)(C), Utah Code Annotated:

(C) "Qualified employer" means any employer who was an employer as defined in this chapter during each of the 12 consecutive calendar quarters immediately preceding the computation date; and had employment in each of the three completed calendar years immediately preceding the computation date. On or after January 1 of any contribution year prior to January 1, 1983, and a rate of less than 5% on or after January 1, 1983, but before January 1, 1985, a rate of less than 8% on or after January 1, 1985, but before January 1, 1988, and a rate of less than the maximum overall contribution rate on or after January 1, 1988, only with respect to new employers and to those qualified employers who, except for amounts due under commission determinations that have not become final, paid all contributions prescribed by the commission with respect to the 12 consecutive calendar quarters immediately preceding the computation date prior to January 1, 1985, and the four consecutive calendar quarters in the fiscal year immediately preceding the computation date on or after January 1, 1985. Notwithstanding Subsection 35-4-7(b), on or after January 1, 1988, any employer who fails to pay all contributions prescribed by the commission with respect to the four consecutive calendar quarters in the fiscal year immediately preceding the computation date, except for amounts due under determinations that have not become final, shall pay a contribution rate equal to the overall contribution rate determined under the experience rating provisions of this chapter, plus an additional surcharge of 1% of wages. A qualified employer who pays all required contributions shall, for the current contribution year, be assigned a rate upon his own experience as provided under the experience rating provisions of this chapter effective the first day of the calendar quarter in which the payment was made. Delinquency in filing contribution reports shall not be the basis for denial of a rate less than the maximum contribution rate.

If an employer, other than a reopening employer, has acquired all or substantially all the assets of another employer and the other employer had discontinued operations upon the acquisition, the period of liability with respect to the filing of contribution reports, the payment of contributions, after January 1, 1985, the benefit costs of both employers, and the payrolls of both employers during the qualifying period shall be jointly considered for the purpose of determining and establishing the acquiring party's qualifications for an experience rating classification. The transferring employer shall be divested of his payroll experience.

When an employer or prospective employer, other than a reopening employer, has acquired an operating department, section, division, or any substantial portion of the business or assets of any employer which is clearly segregable and identifiable, the entire payroll experience, and benefit costs after January 1, 1985, of the transferring employer shall be divided between the transferring and acquiring employers in proportion to the payroll for the four preceding completed calendar quarters attributable to the operating assets conveyed and retained. The rate of the acquiring employer for the current contribution year shall be that rate which is assigned under rules of the commission.

Any employing unit or prospective employing unit which acquires all or part of the payroll experience of an employer shall, for all purposes of this chapter, be an employer as of the date of acquisition.

When an employer, as provided in this subsection, has been divested of his payroll experience by transferring all of his business to another and by ceasing operations as of the date of the transfer, the transferring employer shall, notwithstanding Section 35-4-8, cease to be an employer, as defined by this chapter, as of the date of transfer.

CERTIFICATE OF SERVICE

This is to certify the foregoing Brief of Appellant was served on the Department of Employment Security this 10th day of August, 1988, by mailing four (4) true and correct copies thereof via United States Mail with postage prepaid thereon to

K. Allen Zabel
Special Assistant Attorney General
The Industrial Commission of Utah
Department of Employment Security
1234 South Main Street
Salt Lake City, Utah 84147